

STATE OF MICHIGAN
COURT OF APPEALS

JANICE G. TURO, Individually, and as Personal
Representative of the Estate of JAMES F. TURO,
Deceased, and as Trustee of the JANICE G. TURO
Revocable Trust,

UNPUBLISHED
June 20, 2006

Plaintiff/Counter-Defendant-
Appellee,

v

No. 267583
Macomb Circuit Court
LC No. 2005-000230-CH

ANNE E. TURO,

Defendant/Counter-Plaintiff-
Appellant.

Before: Cooper, P.J., and Neff and Borrello, JJ.

PER CURIAM.

Defendant, Anne E. Turo, appeals as of right from the trial court's opinion and order declaring plaintiff, Janice G. Turo, the rightful titleholder of real property located in Chesterfield Township ("Chesterfield property"). We reverse and direct the trial court to make a finding as to the respective rights in the Chesterfield property of plaintiff and defendant. We note that at the time of divorce decree between James and Anne Turo, ownership of the property was split equally as a co-tenancy, but we also note that James Turo had sole responsibility for taxes and maintenance, although also sole possession, of the property. James Turo's interest passed to plaintiff Janice Turo in its entirety.

This case involves a property dispute between plaintiff, the surviving spouse of James Turo ("decendent"), and defendant, the decendent's former spouse. Defendant claimed an interest in the Chesterfield property under the terms of a January 20, 1975, divorce judgment. The judgment declared that the property would be held by Anne and James Turo as tenants in common. Following the divorce, James Turo had retained sole possession of the Chesterfield property, and was held solely responsible for the balance of a home improvement loan, taxes, insurance, and all maintenance. Either Anne or James Turo could have sought a partition and sale of the Chesterfield property at any time. The divorce judgment also awarded the parties joint interest as tenants in common in a vacant lot in Grayling, Michigan ("Grayling property"). James Turo released his interest in the Grayling property to Anne Turo by quit claim deed on April 23, 1977. Plaintiff asserts that this transfer was part of an agreement between James and Anne Turo whereby Anne would relinquish her interest in the Chesterfield property in exchange

for the Grayling property and cash payments. Defendant argues there was no agreement and no payments were made. It appears that because these events took place so many years ago, and because James Turo, a critical player in these events, is now deceased, no evidence has been or can be produced to prove either party's claim.

Plaintiff married James Turo in June 1976, and thereafter resided with him at the Chesterfield property. In September 2004, James Turo executed a quitclaim deed conveying his interest in the Chesterfield property to plaintiff, as trustee of the Janice G. Turo Revocable Trust, for a recited consideration of \$1. After James Turo's death in December 2004, plaintiff filed this action against defendant, seeking a decree granting her full title to the Chesterfield property based on theories of unjust enrichment, adverse possession, specific performance of an alleged agreement between defendant and James Turo, and an action to quiet full title of the Chesterfield property in her favor. Defendant filed a counterclaim for partition of the Chesterfield property.

Plaintiff moved for summary disposition under MCR 2.116(C)(10). The trial court denied the motion, finding that genuine issues of material fact existed concerning the alleged agreement between defendant and the decedent. The court considered the argument that the Statute of Frauds would prohibit enforcement of the alleged agreement since it was never put in writing, and dismissed this argument on the grounds that "such an agreement may still be recognized when there is evidence of partial performance in reliance on the agreement." See *McDonald v Scheifler*, 323 Mich 117, 126; 34 NW2d 573 (1948). The court found that the agreement "must be recognized" because the facts indicated James Turo had performed his duties under the agreement at least partially by transferring the Grayling property. The court further found, however, that a question of fact remained as to whether James Turo had performed his duties under the agreement in their entirety, given the lack of any evidence to show consideration other than the Grayling property. The court found summary disposition inappropriate where this question of fact remained.

Defendant moved for reconsideration, arguing that her deposition testimony did not support the court's finding of fact that an agreement regarding the Grayling and Chesterfield properties existed between defendant and James Turo. The court denied the motion for reconsideration, but clarified that a question of fact remained as to whether there was an agreement between defendant and James Turo regarding the properties. Plaintiff then moved for reconsideration, and the court denied the motion.

Plaintiff then moved for summary disposition again, requesting the court to dismiss defendant's counterclaim for partition, arguing under the doctrine of laches that defendant, having failed to assert her right to partition for 28 years, should not be allowed to assert it now. Alternatively plaintiff requested the court to declare defendant equitably estopped from denying the existence of the agreement regarding the properties, and equitably estopped from asserting that there was insufficient consideration paid to complete James Turo's performance under the agreement. As to the laches argument, the court found it would be "highly prejudicial, inequitable and unjust to grant defendant's request for partition," apparently because defendant had not requested partition until after the death of James Turo, who would have been the key witness to the details of the agreement. As to the equitable estoppel argument, the court found that defendant's silence as to the property for the last 28 years had led plaintiff to rely on her belief that defendant and James Turo had resolved the issue in 1977. The court appears to have found that because "[n]either party can produce documents definitely supporting her particular

position,” the questions of fact that had remained after plaintiff’s first motion for summary disposition should now be resolved in favor of plaintiff. The court declared plaintiff to be the rightful titleholder of the Chesterfield property.

Before addressing defendant’s arguments on appeal, we note that the dispositive issue here is the trial court’s erroneous ruling as to the Statute of Frauds claim raised by defendant in response to plaintiff’s first motion for summary disposition. Michigan’s Statute of Frauds provides that:

No estate or interest in lands, other than leases for a term not exceeding one [1] year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by some person thereunto by him lawfully authorized by writing.

MCLS § 566.106. The trial court correctly noted that this statute may be inapplicable where one party has performed its obligations: “If one party to an oral contract, in reliance upon the contract, has performed his obligation thereunder so that it would be a fraud upon him to allow the other party to repudiate the contract, by interposing the statute, equity will regard the contract as removed from the operation of the statute.” *McDonald v Scheifler*, 323 Mich 117, 126; 34 NW2d 573 (1948). However, in that case the court found that:

The record is convincing that plaintiff and Miller entered into an agreement as contended for by plaintiff. The agreement provided that plaintiff was to perform certain labor in the construction of a home for both parties; and that plaintiff was to become its owner upon the death of Miller. Plaintiff having performed his part of the agreement is now entitled to specific performance.

Id. While in that case as in this one the parties disputed the existence of the underlying oral agreement, the present case is still plainly distinguishable because here there is an open question as to whether James Turo ever fully performed his obligation. Plaintiff’s assertion that the transfer of the Grayling property was partial performance may be logical, but it is supposition only, and we therefore find it is not sufficient grounds to take the oral agreement out of the Statute of Frauds. Because this agreement for the transfer of an interest in land was not in writing, and there is no evidence of full performance by the party seeking the equitable remedy of removing the agreement from the operation of the statute, we find that the Statute of Frauds operates as a complete defense to plaintiff’s claims. Accordingly we reverse the trial court grant of summary disposition for plaintiff. We find that plaintiff and defendant both have valid claims to the property as co-tenants, Anne Turo through the divorce decree and Janice Turo through inheritance of James Turo’s share, and we direct the court to make a finding as to what the parties’ respective shares in the property are at this point, whether the same as they were at the time of the divorce decree, or changed by the use of the property over time.

Although we find the Statute of Frauds issue dispositive, we briefly address the issues raised by defendant on appeal. Defendant first argues that the trial court erred in granting summary disposition because genuine issues of material fact remain. We agree. The court decided this matter in the context of a motion for summary disposition under MCR 2.116(C)(10).

We review a trial court's summary disposition ruling de novo to determine if the moving party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A trial court's dispositional rulings regarding equitable matters are also reviewed de novo. *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 40; 700 NW2d 364 (2005).

A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Maiden, supra* at 120. The trial court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties, to the extent the evidence is substantively admissible, in a light most favorable to the nonmoving party. *Id.* at 120-121; MCR 2.116(G)(6). Summary disposition is properly granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Maiden, supra* at 120-121. A trial court may not make findings of fact when deciding the motion. *In re Handelsman*, 266 Mich App 433, 437; 702 NW2d 641 (2005).

It is apparent from the trial court's rulings on plaintiff's first motion for summary disposition that questions of fact remained as to whether an agreement existed with respect to the properties, and as to whether appropriate consideration was paid to fulfill James Turo's part of that agreement if it did exist. It is apparent from the trial court's ruling on plaintiff's second motion for summary disposition that the court resolved these questions of fact in favor of plaintiff without plaintiff having provided any additional evidence. We find that the questions of fact remain and that summary disposition for plaintiff is inappropriate.

Defendant next argues that the trial court erred in applying the doctrine of equitable estoppel to declare plaintiff the rightful titleholder of the Chesterfield property. In general, the plaintiff has the burden of proof and must establish a prima facie case of title in an equitable action to quiet title. *Beulah Hoagland Appleton Qualified Personal Residence Trust v Emmet Co Rd Comm*, 236 Mich App 546, 550; 600 NW2d 698 (1999). If the plaintiff makes out a prima facie case, the burden shifts to the defendant to show superior right or title. *Id.*

Here, the trial court relied on the doctrine of equitable estoppel to declare plaintiff the rightful titleholder to the Chesterfield property. "Equitable estoppel is not an independent cause of action, but instead a doctrine that may assist a party by precluding the opposing party from asserting or denying the existence of a particular fact." *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 140-141; 602 NW2d 390 (1999) (citation omitted).

In the context of this case, the narrow issue that we must decide is whether plaintiff, with the aid of equitable estoppel, could establish full title to the Chesterfield property by estopping defendant from denying the existence of an agreement with the decedent to transfer her interest in the property to him, and the sufficiency of the decedent's consideration to support that alleged agreement. In considering this issue, we note that the only evidence of the legal title for the Chesterfield property indicates that title had been held by defendant and the decedent as tenants in common under the terms of the 1975 divorce judgment, and that in 2004 the decedent had conveyed his interest¹ in the property to plaintiff, as trustee of the Turo Trust. Because plaintiff

¹ A tenant in common's interest is fully alienable. *Albro v Allen*, 434 Mich 271, 282 n 3; 454 (continued...)

derived her title through the decedent and there is no evidence that the decedent had ever acquired full legal title to the Chesterfield property, the trial court's declaration of plaintiff as the rightful owner of the property on the basis of an alleged agreement between defendant and the decedent may be upheld only if this alleged agreement forms a basis for establishing full equitable title² in the decedent.

Examined in this context, we agree with defendant that the submitted evidence did not support application of the doctrine of equitable estoppel to have established full equitable title in the decedent.

Equitable estoppel may arise where (1) a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, (2) the other party justifiably relies and acts on that belief, and (3) the other party is prejudiced if the first party is allowed to deny the existence of those facts. . . . Silence or inaction may form the basis for an equitable estoppel only where the silent party had a duty or obligation to speak or take action. [*Conagra, Inc., supra* at 141 (citations omitted).]

The trial court erroneously focused on evidence of defendant's silence and inaction with respect to the property to find that defendant effectively misled plaintiff to believe that she had settled the matter concerning the Chesterfield property with the decedent in 1977. Because there was no evidence that defendant owed any duty or obligation to plaintiff, defendant's silence and inaction does not equitably estop her from denying the existence of the alleged agreement with the decedent, or the absence or sufficiency of consideration. Therefore, we reverse the trial court's decision declaring plaintiff the sole titleholder of the Chesterfield property based on the alleged agreement.

Next, we consider the trial court's application of the doctrine of laches to preclude defendant's counterclaim for partition. Again, we apply the de novo standard of review applicable to decisions on summary disposition, *Maiden, supra* at 118, and rulings in equitable matters, *Blackhawk Dev Corp, supra* at 40.

A partition action is equitable in nature. MCL 600.3301. A partition action generally has a distribution of possession as its object. *Albro, supra* at 284. But if an equitable physical division may not be achieved, "the court may also order sale and division of the proceeds." *Id.* at 284. Laches is an affirmative defense to a cause of action that must be pleaded and proven. MCR 2.111(F)(3); *Lothian v Detroit*, 414 Mich 160, 168; 324 NW2d 9 (1982); *Badon v Gen Motors Corp*, 188 Mich App 430, 436; 470 NW2d 436 (1991). Laches is concerned with the prejudice occasioned by delay. *Lothian, supra* at 168. "It is applicable in cases in which there is

(...continued)

NW2d 85 (1990).

² Equitable title may arise from the purchase of property from another who retains legal title. *Steward v Panek*, 251 Mich App 546, 551-553; 652 NW2d 232 (2002). With an executory contract, as distinguished from a purchase agreement, equitable title passes to the buyer or vendee upon proper execution of the contract. *Zurcher v Herveat*, 238 Mich App 267, 291; 605 NW2d 329 (1999).

an unexcused or unexplained delay in commencing an action and a corresponding change of material condition that results in prejudice to a party.” *Dep’t of Pub Health v Rivergate Manor*, 452 Mich 495, 507; 550 NW2d 515 (1996).

Upon de novo review, we conclude that the trial court erred in granting plaintiff’s motion for summary disposition. Plaintiff sought to establish that defendant’s delay in seeking partition prejudiced her ability to prove that defendant was not a rightful cotenant of the Chesterfield property. Viewed in a light most favorable to defendant, the submitted evidence established that the decedent’s death and defendant’s claimed deficient memory affected plaintiff’s ability to prove the alleged agreement between defendant and the decedent, which served as the basis for plaintiff’s claim of equitable title. Evidence lost during a period of delay, while a relevant consideration in applying the doctrine of laches, is not dispositive of whether a court of equity should bar a claim. See *Kelley v Hoogerhyde*, 314 Mich 37; 22 NW2d 63 (1946); *Evans v Linck*, 280 Mich 278; 273 NW 568 (1937).

Here, the one clear fact is that defendant has legal title to the property upon which to seek partition. It is also clear from plaintiff’s own deposition testimony that she was aware of defendant’s interest in the Chesterfield property, but relied on the decedent to handle the matter in 1977. There is no evidence that plaintiff investigated the question of legal title for the Chesterfield property until years later, in 2004, shortly before the decedent died. The equities do not support barring any partition relief to defendant merely because she waited to seek partition until after being presented with plaintiff’s complaint. The evidence presented to the trial court did not establish the kind of prejudice occasioned by inexcusable delay to bar defendant’s counterclaim for partition. Therefore, the trial court erred in granting plaintiff’s motion for summary disposition with respect to defendant’s counterclaim for partition.

We reverse and direct the trial court to make a finding as to the respective rights in the Chesterfield property of plaintiff and defendant. We do not retain jurisdiction.

/s/ Jessica R. Cooper
/s/ Janet T. Neff
/s/ Stephen L. Borrello